United States of America

IN THE

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 610

INTERNATIONAL TYPOGRAPHICAL UNION,
A VOLUNTARY ASSOCIATION,
Petitioner (Appellant Below),
vs.
COUNTY OF MACOMB, A MUNICIPAL CORPORATION, MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, A PUBLIC QUASI CORPORATION, BOARD OF SUPERVISORS OF MACOMB COUNTY, GEORGE T. SMITH, DRAIN COMMISSIONER OF MACOMB COUNTY, AND CARL B. BRANDENBURG, TREASURER OF MACOMB COUNTY,
Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Respondents (Appellees Below).

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court

of the State of Michigan entered October 11, 1943, affirming an order of the Circuit Court of Macomb County entered January 28, 1943.

(Unless clearly shown by context, figures in parentheses refer to pages of the Transcript of Record filed in this Court)

OPINION BELOW

The opinion of the Circuit Court of Macomb County granting a motion by defendants to dismiss was filed January 22, 1943 (141). The opinion of the Supreme Court of Michigan (157) was rendered October 11, 1943. It appears volume 306, p. 562 Mich. Reports. A motion for rehearing (197) was seasonably filed and denied November 29, 1943 without opinion (206).

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 237(b) Judicial Code, 43 Stat. 937, 28 U. S. C. 344(b), 28 U. S. C. A., Sec. 344(b), which gives this court jurisdiction to review a final judgment of the highest court of a state in which a decision in the suit could be had, "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held authority exercised under the United States; and the power to review under this section may be exercised as well where the federal claim is sustained as where it is denied."

The judgment sought to be reviewed was entered October 11, 1943 (168). Motion for rehearing (197) was filed October 29, 1943, within the time authorized by the rules of said Court, and was denied November 29, 1943 (206) without opinion.

The said judgment was rendered or passed by the highest court of the State of Michigan in which a decision could be had in the case, and this petition is filed within three months after the entry of the denial of the motion for rehearing.

In such cause and judgment rights, privileges and immunities were specially set up or claimed by defendants under a statute of or authority exercised under the United States, and a federal claim was sustained; also rights, privileges and immunities were specially set up and claimed by plaintiff under the Constitution of the United States, and the federal claim was denied.

SUMMARY STATEMENT

This case involves the propriety of an order of dismissal on the ground of prior adjudication by a United States Court in a case to which petitioner was not a party, nor in privity with any party, and in which there was no service of process upon petitioner and no action taken under Section 57 of the Judicial Code, Sec. 118 Title 28 U. S. C. A., to obtain jurisdiction over any rights of petitioner in specific property.

This suit was instituted in the Circuit Court for the County of Macomb, Michigan, In Chancery, by a bill of complaint in which petitioner alleged its ownership of $200,000.00 par value of bonds issued by Martin Drain and Branches Drain District, all of which were due as to principal and in default as to interest. It set forth the proceedings taken in behalf of the district preliminary to their issue and the correctness thereof. It alleged that refusal to pay the bonds was based upon the unfounded claim that the improvement constructed with the proceeds of the bonds, of which petitioner's are a part, was not in

fact a drain, but an improvement outside of the jurisdiction of the drain commissioner to construct. It describes the improvement as a conduit built underground for the purpose of transporting surface water from the district to Lake St. Clair. It invokes the statutory provisions in relation to raising funds by taxation for the payment of the bonds, and also special statutory provision Sec. 15, Ch. X, Act 331 Michigan Public Acts 1927, which in some circumstances requires the county in which a drain district is located to pay the bonds from its general fund. The bill prays that its bonds be declared to be valid and enforceable, that a tax be levied for their payment, and that the county advance money for their payment from its general fund.

The only pleading to this bill of complaint was a motion to dismiss (14), the principal ground of which, and the only ground considered by the trial court, was *res judicata*. In this motion there was no attack on the sufficiency of the allegations of the bill, and the trial court, in disposing of the motion, conceded that for the purpose of his opinion the allegations therein must be accepted as true (142).

The claim of *res judicata* was that a case decided by the United States Circuit Court of Appeals, Sixth Circuit, was a bar to the instant case (14). From defendants' supporting affidavits and exhibits, it appears that in 1932 there was outstanding over $1,000,000.00 par value of bonds of said district (45) of the same issue as the bonds on which petitioner seeks relief, and that Kenneth M. Keefe and two co-plaintiffs, owners of 132 of said bonds, filed a bill of complaint in the United States District Court of Michigan to obtain a decree adjudicating the validity of the entire outstanding bonds, and to require performance by the county and its officials of various statutory

duties to raise funds for their payment. Plaintiffs in that case alleged that they sued in their own behalf and for other bondholders, and that the case was an appropriate class action under the existing Equity Rule 38. The district, county and its officials, and various taxpayers made defendants, contested this suit on the ground that the improvement constructed with the bond proceeds was not a drain, as that term should be understood in Michigan law, and that this was a defect which nullified the bonds. Proofs were taken and the District Judge held that while the improvement was not a legal drain, bonds were valid and enforceable because of recitals therein and good faith holding (130). Pursuant to the opinion, a judgment was entered (68) which granted the relief prayed, and made provision for other holders of bonds, not parties to the suit, to come in under the judgment and receive pro rata distributions of funds which would be made available by action which defendants were enjoined to take.

No action was taken to provide such funds because defendants promptly appealed to the Circuit Court of Appeals, Sixth Circuit, which after due consideration reversed the judgment of the district court. Its opinion, reported 119 F. (2) 157 (18) shows the issues presented on appeal. Keefe, et al., contested the lower court's decision that the improvement was illegal as a drain, but otherwise supported the principle announced in the district court that the bonds were valid because of estoppel resulting from the bond recitals. Defendants supported the holding of the lower court as to illegality of the project, and urged that this required a decision that the bonds were invalid. No question was raised as to the propriety of a class action. The decree entered in accordance with the opinion (37) merely reverses the case and dismisses the bill of complaint. Both opinion and decree are silent as

to the effect which the court intends as to persons not parties to the suit. Keefe, et al., unsuccessfully petitioned for a rehearing and for certiorari in this court.

Defendants' motion for dismissal (14) in this case shows no ground to connect this petitioner with the federal court case, except that it was one of the class for whom Keefe, et al., alleged that they instituted the suit. It was not named as a party, no process of any kind was served upon it, nor does it appear that it had a residence in the State of Michigan which would make it subject to service of process, nor does it appear that notice was issued, served or published pursuant to Section 57, Judicial Code, Section 118, Title 28, U. S. C. A. Affidavits filed in opposition to the motion show that petitioner's treasurer learned of the existence of the Keefe suit, but knew nothing concerning it except that it involved questions as to the validity of the bonds (102). It retained its bonds and made no agreement with Keefe, et al., as to the prosecution of the suit. After the Court of Appeals decision it made an unsuccessful attempt to file a brief *amicus curiae* with the Court of Appeals to urge the grant of rehearing, and later filed in this court a brief *amicus curiae*, urging that this court grant certiorari. The opinions of the lower courts make no point of these acts as a voluntary submission to the jurisdiction of the federal court. No facts appear which would establish a relationship of privity with any party to the suit. Thus the sole basis of the claim of *res judicata* is that the Keefe suit was a class action and its termination in favor of defendants prevents this petitioner from litigating any matters there decided.

This petitioner appealed from the order of the Macomb County Circuit Court assigning as error the holding that the suit was barred by prior decree (2). This necessarily included arguments that the decree was not intended

by the Court of Appeals to have the effect claimed, that the Court of Appeals had acquired no jurisdiction to pass upon its rights, and that due process as guaranteed by the Fourteenth Amendment was denied, and the briefs filed fully present the issues. The opinion of the Supreme Court of Michigan, 306 Mich. 562 (157), indicates consideration of these issues and assent to the proposition that jurisdiction of the federal court over petitioner was obtained through the allegations of Keefe, et al., that they brought their suit as a class action. A suggestion is also made in the opinion that if it were not for the holding of *res judicata,* the case if tried would have to be decided adversely to petitioner on grounds of *stare decisis.* A motion for rehearing was filed (197), in which petitioner urged error in disregarding the Fourteenth Amendment. Rehearing has been denied by an order entered November 29, 1943 (206).

Petitioner has filed with the clerk of this court a complete transcript of the record of all proceedings in the case as it was presented in the Supreme Court of the State of Michigan, duly certified by its clerk.

QUESTIONS PRESENTED BY THIS PETITION

1. In the absence of statements in a decree of a federal court of appeals, or its accompanying opinion, purporting to make matters decided thereby binding upon persons other than parties to the suit, or those in privity with them, is anything so decided *res judicata* against such person?

2. In the absence of personal service, notice in accordance with Section 57, Judicial Code, U. S. C., Title 28, Section 118, or voluntary appearance, does any decision

of a federal court (other than in actions purely *in rem*) bind persons not parties to the suit, or their privies?

3. Does authority granted by former Equity Rule 38, or present Rule 23 of Rules of Civil Procedure, to institute a class suit in the federal court, make a judgment in such suit binding upon persons not actual parties, insofar as it determines matters affecting separate and independent choses of action of a personal nature?

4. If none of the foregoing are answered in the negative, does the granting of a motion to dismiss a suit in a state court on the ground of *res judicata* by the federal court, deny plaintiff in such suit, who was not a party to the prior suit or privy thereto, due process as guaranteed by the Fourteenth Amendment?

5. Does summary denial of the right to sue in a state court on the ground of *stare decisis*, without challenge of the sufficiency of a suitor's pleading, deny due process as guaranteed by the Fourteenth Amendment?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Manifest error reviewable in this court appears in the record, judgment and decision of the Supreme Court of Michigan referred to above, in the following:

1. In holding that the decree of the United States Court of Appeals, Sixth Circuit, entered in its suit No. 8583, entitled Martin Drain and Branches Drain District, et al., Defendants and Appellants, v. Keefe, et al., Plaintiffs and Appellees, is *res judicata* against petitioner.

2. In holding that purport of such decree was intended to be a binding adjudication adverse to petitioner as to all rights of every nature growing out of bonds issued by

defendant Martin Drain and Branches Drain District held by petitioner.

3. In holding that such decree was rendered in a proceeding *in rem,* and binding upon all the world, and that service of process and procedure pursuant to Section 57, Judicial Code, U. S. C., Title 28, Section 118, was unnecessary.

4. In holding that authority granted by former Federal Equity Rule 38 and present Rule 23 of Rules of Civil Procedure, in reference to class suits in federal courts, makes a judgment in such a class suit binding upon persons not actual parties or their privies, insofar as it determines matters affecting separate and independent choses of action of a personal nature.

5. In holding that due process as guaranteed by the Fourteenth Amendment was not violated in denying petitioner the right to sue for the enforcement of its bonds, on the ground that the decree of the Circuit Court of Appeals, identified in paragraph 1 hereof, was a complete bar to such suit.

6. In ignoring due process of law as guaranteed by the Fourteenth Amendment by dismissal of petitioner's bill of complaint on the ground of *stare decisis,* in the absence of any challenge to the sufficiency of the pleading.

Wherefore, petitioner prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Michigan, commanding that court to certify and send to this court for review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 42,410, International Typographical

Union, Plaintiff and Appellant, v. County of Macomb, et al.,'' unless the certified copy of said record now on file in this Court be deemed sufficient for that purpose; and that the judgment therein be reversed by this court, and that your petitioner may have such other and further relief in the premises as to the court may seem just and proper.

Dated: January 15, 1944.

INTERNATIONAL TYPOGRAPHICAL UNION,
Petitioner,

By IRVIN LONG,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

Opinion of the Circuit Court for Macomb County granting defendants' motion to dismiss (141). Opinion of Supreme Court of the State of Michigan affirming decision embodied in opinion of Circuit Court for Macomb County (157), Vol. 306, p. 562, Michigan Reports.

II.

1. Date of judgment to be reviewed is October 11, 1943. Motion for rehearing denied November 29, 1943, without opinion order denying same (206).

2. The statutory provision believed to sustain jurisdiction of this court is Sec. 237(b) of the Judicial Code, U. S. C. A. Title 28, Sec. 344(b).

3. Cases believed to sustain jurisdiction.

Pittsburgh etc. R. R. Co. v. Long Island L. & T. Co., 172 U. S. 493;
Hansberry v. Lee, 311 U. S. 32;
Toucey v. N. Y. Life Ins. Co., 314 U. S. 118.

Immaterial under this section whether the federal claim is sustained or denied.

Virginia v. Imperial Coal Sales Co., 293 U. S. 15.

The time within which petitioner is entitled to file this petition is within three months after the order of the Michigan Supreme Court denying motion for rehearing.

Citizens Bank v. Opperman, 249 U. S. 448;
Andrews v. Virginian Ry. Co., 248 U. S. 272;
Department of Banking v. Pink, 317 U. S. 264.

III.

The recital of facts contained in the "Summary Statement of Matters Involved" in the accompanying petition for writ of certiorari, together with facts recited in the opinion of the Supreme Court of the State of Michigan (157), is a sufficient statement to serve this court in its consideration of this brief. Same are hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

The errors in the decision of the Supreme Court of the State of Michigan which are relied upon by petitioner in this case are set out in the statement of "Reasons Relied Upon for the Allowance of Writ" in the accompanying petition for writ of certiorari (p. 8 *supra*). Petitioner will rely upon and urge before this Court all errors therein assigned. Same are adopted and made part of this brief.

V.

ARGUMENT

Summary

We assume that the Acts of Congress relating to this court's jurisdiction, and the decisions cited in paragraph 2 hereof, need no exposition and that this court will be satisfied therefrom of its power to act. Reasons why it should act are summarized as follows:

1. A denial of justice to a substantial extent has been suffered by petitioner. Important questions in federal jurisprudence are involved, which ought to be settled.

2. There are substantial errors of a federal nature involved in the lower court's decision which can and ought to be reviewed by this court in the following respects:

(a) A federal court decree has been given a construction unwarranted by any language therein or the accompanying opinion, in that it has been treated as an adjudication of rights of parties not before the court.

(b) Even if the court which rendered such decree had expressly stated what the lower courts imply, it would have been powerless to do so.

(1) Statutes governing district courts and courts of appeal strictly limit methods of acquiring jurisdiction. There is no authority in such statutes which would warrant a decree disposing of any rights *in personam* or *in rem* of this petitioner, under the circumstances disclosed here.

(2) On the assumption that federal courts can, in spite of such statutory limitations, exercise jurisdiction over the rights of persons not before them when class suits are brought, the decree claimed to be *res judicata* was not rendered in such a class suit where it could have the effect claimed in the present proceeding.

(c) If the lower court's opinion can be interpreted as presenting another ground independent of *res judicata, i. e.,* that a decision would have to be ultimately rendered against petitioner on the ground of *stare decisis,* due process was denied by such summary dismissal in the absence of a challenge or hearing on the sufficiency of petitioner's pleading, or permission to support its pleading with proofs.

I.

THE QUESTIONS PRESENTED DESERVE CONSIDERATION

Assuming that a petition for certiorari should convince the court that there is a reasonable probability of denial of justice, and that important questions of federal jurisprudence are involved, we proceed first to show the importance of the case to petitioner.

It has a claim against the drain district based upon its solemn assurances contained in bonds issued in apparent good faith, and purchased for an adequate consideration and in the firm expectation that the promises contained therein would be performed. That claim, with interest for twelve years, now amounts to over $332,000.00. It is petitioner's duty to its members to enforce it, if possible.

Notwithstanding hints contained in the opinion below that the Michigan court will ultimately deny the claim, that cannot be known in advance. Petitioner has evidence which it believes will convince a court which can hear the controversy on its merits that every representation contained in the bonds as to proper performance of all conditions precedent occurred, and believes that former decisions of the Michigan Supreme Court as to the binding effect of such representation will be accepted. It recognizes that it must overcome the precedent established by the decision of the Circuit Court of Appeals and the arguments which will be made as to the sanction by this court of such decision by reason of its refusal to grant a writ of certiorari. Notwithstanding all this, it believes that the law and the facts are with it, and that any court which will grant it a fair hearing will be convinced of the justice of its claim. Although some similarly constructed improvements have been held illegal, an equal number have been considered legal

in the published reports. See *Royal Oak Drain District v. Keefe*, 87 Fed. (2) 786, and cases there cited, and *Detroit Trust Co. v. Dingman*, 291 Mich. 170. Many more have been held legal in unreported decisions of the Michigan Circuit Court. There is no reason so far as it can see why the principles declared in *Detroit Trust Co. v. Dingman (supra)* should not apply here. As to this court's denial of certiorari to review the decision of the Circuit Court of Appeals, this court has repeatedly stated that denial of certiorari is not equivalent to an affirmance.

From the standpoint of federal jurisprudence, the case involves some vitally important questions surrounding the main inquiry as to the power of a federal court, under the circumstances detailed here, to make a decree binding upon persons never brought before it, and given no opportunity to defend their claims, and who cannot be connected with the litigation by any known principle of privity or *res judicata*. Many of these questions have been discussed in leading authorities on federal practice,—*Street, Federal Equity Practice* (1909), Sec. 548; *Moore's Federal Practice Under the New Rules* (1938), pp. 2283-2301,—and by the lower federal courts,—*Central Mexican Light & Power Co. v. Munch*, 116 Fed. (2) 85; *Women's Catholic Order of Foresters v. Arlington*, 28 Fed. Supp. 663; *Shain v. Armour & Co.*, 40 Fed. Supp. 488; *Brooks v. Southern Dairies, Inc.*, 38 Fed. Supp. 588; *Hunter v. Southern Indemnity Underwriters, Inc.*, 47 Fed. Supp. 242. If the views there expressed are correct, then the decision of the Michigan court which is here attacked is erroneous. If they are mistaken, then they should be corrected.

1. Substantial Errors of the Lower Courts Reviewable Here.

(a) The Michigan courts should not have interpreted the decree of the Circuit Court of Appeals as extending its authority over this petitioner.

Although we disagree with opinion of the Court of Appeals, 119 Fed. (2) 157 (18), it is but just to note that nothing which it said in its opinion or decree (37) manifests any intent on its part to extend its jurisdiction to anyone not present in the litigation. Its decree merely says that the judgment which Keefe and his co-plaintiffs obtained in the District Court must be reversed, and that their bill must be dismissed. Not a word appears in it or the accompanying opinion suggestive of any purpose to bind any absent parties to its pronouncements. Presumably, from anything the court said, if this petitioner had sued in the Federal Court instead of in the State Court, it would have sustained its right to a hearing on the merits and be guided by the evidence presented and principles of law deemed applicable.

Before assuming that a court has exercised jurisdiction over persons not before it, reference should be made to its decree and opinion, and if they disclose no such intent, no inferences should be countenanced.

(b) Had the Circuit Court of Appeals attempted to pass upon petitioner's claims, it would have been powerless to do so.

A Federal Court of Appeals is but a reviewing court, powerless to do more than a District Court could do. The District Court can only exercise the jurisdiction assigned to it by the Acts of Congress. It has no power to acquire jurisdiction over persons against their consent, without

the service of process, and it cannot affect their interests in property in the absence of procedure set forth in Judicial Code 57, Sec. 118, Title 28, U. S. C. A.

A defendant who defeats a suit against him can claim no more for his judgment in relation to others who have like causes of action than if he had directly attempted to sue them and had not followed procedure to bring them before the court. The issuer of these bonds is in no better position because of its success in defeating Keefe and his co-plaintiffs than were the issuers of the bonds involved in *Brooklyn v. Insurance Co.*, 99 U. S. 362, 370, and *Pana v. Bowler*, 107 U. S. 529, 544. Those municipalities had support of a statutory procedure and had published notice demanding that holders of their bonds should come in and litigate them, yet this court had no difficulty in seeing that judgments obtained upon such procedure were lacking in due process and were inconclusive. What a municipality cannot do directly in suits against its bondholders, it cannot do indirectly.

The Michigan Supreme Court assumes that any court, even a Federal Court, whose powers are strictly limited by Acts of Congress, can dispense with notice to litigants in a true class suit which it regards as a proceeding *in rem*. Not being concerned in this case with what other courts may do, this case should be considered first from the standpoint of powers of Federal Courts as limited by the statutes which create them and define their jurisdiction. In the absence of voluntary submission to the court's jurisdiction, we deny that a Federal Court can in any way or under any condition adjudicate rights of parties not before them, but if the court accepts the view that certain class suits are to be excepted, we deny that the decree urged as *res judicata* was rendered in such a class suit as comes within the exception.

Authority is scarcely needed to prove that the expressed will of Congress as to how courts which it creates may acquire jurisdiction cannot be thwarted. These are rules of substance made for the protection of citizens which cannot be disregarded.

Hurn v. Oursler, 289 U. S. 338;
Robertson v. Railroad Labor Board, 268 U. S. 619;
U. S. v. Sherwood, 312 U. S. 584, 589, 590;
Toucey v. New York Life Ins. Co. (supra).

There is no statute which permits a Federal Court to acquire jurisdiction, in the absence of appearance, without the service of process within a designated territory, and thus render a personal judgment or decree which will have binding force. Congress could not enact such a law if it so desired. *Pennoyer v. Neff,* 95 U. S. 714. There is no statute which permits it to acquire jurisdiction over a thing so as to exert its authority thereon, without some form of notice or actual seizure. Sec. 57, Judicial Code, Sec. 518 U. S. C. A., provides an adequate procedure in all cases where a litigant desires to enforce some claim, or discharge a claim of absent parties in respect to property actually or potentially subject to the court's jurisdiction, and excludes all other methods of acquiring authority to make judgments and decrees with respect thereto. Notice in an adequate form is essential whether the action is *in personam, in rem* or *quasi in rem.*

Roller v. Holly, 176 U. S. 398;
Windsor v. McVeigh, 93 U. S. 274.

Without notice there is no opportunity to be heard, and hence lack of due process. Casual notice and the probability that a party might be permitted to intervene is insuf-

ficient. "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment therein will not affect his legal rights." *Chase National Bank v. Norwalk*, 291 U. S. 475.

The lower court disposed of this case on the theory that in some types of class suits notice to the parties whose rights are to be affected is unnecessary. On this basis it is argued that due process is or should be of no concern to a court if it finds before it some parties who may be relied upon to diligently and honestly assert rights or claims which those who are absent and who have been given no notice might be expected to make. Because rules have been promulgated by this court authorizing class suits, because it has written into its opinions expressions which apparently countenance the view that a judgment or decree in some types of class suits may be binding upon absent parties,

> *Smith v. Swormstedt*, 16 How. 288;
> *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662;
> *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356;
> *Hansberry v. Lee*, 311 U. S. 32;

it has assumed that in some circumstances the opportunity to appear and to contest is unnecessary. We doubt whether any reality exists to support this theory. Are courts so infallible, and may counsel representing one litigant be depended upon to be so skillful, intelligent and industrious as to guarantee that no injustice be done by an *ex parte* adjudication? The explanation contained in the lower court's opinion, quoting from a former opinion of the court, *American State Savings Bank v. American State Savings Bank, Trustee*, 288 Mich. 78, which in turn quotes from other authorities, seems to us to condemn the theory. It is said that in a representative suit "there can be little

danger that the interests of all will be properly protected and maintained." In other words, the prospect of a little injustice which may result is not a discouraging feature. True, injustice may occur even though the party whose rights are to be affected is given a hearing, but at least he has been given a hearing and an opportunity to convince the court. We submit that this court should condemn the theory that one can litigate for another and subject the latter to a binding judgment. The class suit theory has outlived its usefulness. It has been supplanted by the better practice involved in the procedure for constructive service, embodied in Sec. 57 Judicial Code, and similar statutes enacted in all of our states, which eliminate the condition which gave rise to the adoption of the class suit doctrine by English Courts of Chancery. There is now no situation which deprives the courts of this country, at least of the Federal Courts, of power to proceed with litigation because of absence of parties interested in the subject matter, if the methods prescribed in constructive service statutes are followed.

If the court disagrees with the foregoing, the question still remains as to whether the Keefe suit was the type of a class suit where the decree rendered by the Court of Appeals is binding upon absentees. The Michigan court properly recognized the fact that there are some types of class suits in which the decree could not bind absent parties. Moore in his treatise, pp. 2235 *et seq.*, has classified them into the true, hybrid and spurious types, and to some extent the classification has been judicially accepted. Probably the Keefe suit would fall within the classification of hybrid, meaning that it is a combination of both the true and spurious types. Street holds that a true class suit always relates to a fund or property in which numerous parties have interests which are joint or common, so that any litigation which attempts to deal with the fund or

property requires that all be before the court, *Street, Fed. Equity Practice*, Sec. 547, and that a spurious type deals with a personal liability. Moore partially agrees, saying that the true class suit "is one wherein, but for the class action device, the joinder of all persons would be essential. This would be in cases where the right sought to be enforced was joint, common or derivative" (p. 2236). Perhaps the difference in the two definitions is largely in the choice of language, for it is only in the case of a suit involving the disposition or protection of a fund or property, tangible or intangible, that the necessity could arise for compulsory joinder. Both writers agree, and are supported by judicial opinion, that only insofar as a class suit is of the true type has it been held that a judgment or decree would blind absentees. Where there are numerous persons with claims against a common defendant, and no necessity of joinder, it is a spurious type, which court rules or practice statutes may authorize to be brought, but the decree therein can only bind the actual parties and those in privity with them. Moore, pp. 2283 *et seq.*

The allegations of the bill (38) in the Keefe suit, and the prayers for relief, prove that for the most part it is of the spurious type. Having alleged the ownership of 132 bonds and the statutory regulations for their enforcement out of collections from the annual installments of the original assessments, to be supplemented if necessary by advancements from the County's general funds, and the existence of some moneys in the sinking fund, it prayed for a declaration that all of the bonds and assessments were valid and enforceable, and for mandatory injunctions directing the enforcement of the taxes and payments from the general county fund and the sinking fund. The only *res* involved which plaintiffs sought to have administered was the sinking fund and the uncollected assessments. The county officers occupied the position of trustees over this fund and

assessments for the benefit of all holders of bonds, and perhaps their rights were so joined together that all holders would be indispensable parties to any suit having for its object their administration. But in other respects there was no such necessity of joinder. Each holder of bonds could proceed or not, as he wished, independent of all other holders, for a judgment for moneys due, for declaratory relief obligating the defendants to recognize his bonds as valid, or for orders directing payment from the general fund. *Regents v. Pray*, 264 Mich. 693; *Cowen v. Macomb County*, 290 Mich. 361. There was no such common interest in these rights requiring the joinder of all other bondholders. Each could proceed alone, and if it were not for permissive joinder, a modern innovation, each would be obliged to sue alone.

Theories of *res judicata* and *stare decisis* are confused in the opinion below, wherein it says that if any of the bonds were decreed valid they were all valid. What the court must mean is that it would be inconsistent for a court, acting on the same evidence and accepting the same principles of law, to hold some valid and others not. But that consideration does not establish the necessity of joinder. The absurdity of it is apparent when we see cities like New York and Philadelphia issuing a series of bonds in one issue that may run into enormous sums, all governed by the same statutory authority and the same acts of the municipal officers. It is ridiculous to suppose that one holder cannot sue on his bonds without making perhaps a hundred thousand other holders scattered throughout the world parties to his suit. Any time bonds are sought to be enforced in different tribunals, there is a chance of divergent views of the law and facts which will result in conflicting opinions as to validity. The decisions of this court are replete with instances where bonds were held valid in Federal Courts, but not in State Courts.

The court also advances the theory that the Keefe suit was an action *in rem,* but the definition on on which it relies, which is a fair statement of the concept of an action *in rem,* belies the application. Certainly Keefe and his co-plaintiffs were not suing a thing or property, but were suing persons, both natural and artificial, demanding that they perform or refrain from performing certain acts. To the extent that the demand relates to performance of acts with reference to the drain fund or the existing assessments, it might be termed an action *quasi in rem. Freeman v. Alderson,* 119 U. S. 185. But insofar as it demanded recognition of the validity of the bonds, their payment, and acts to be performed which would raise the money to pay them, it was a pure action *in personam.*

Only in the sense that every action on a municipal bond has for its remote object the imposition and collection of a tax lien, was this a suit to impress liens. Since municipalities can only pay their bonds by levying taxes, it does not follow that a suit for judgment upon the bonds, or mandamus to compel a tax levy, is anything other than an action *in personam.*

The lower court also overlooked the principle that in the absence of personal jurisdiction nothing decided in an action *in rem* or *quasi in rem* binds anyone, except the final conclusion reached that the thing over which jurisdiction is exercised shall be disposed of as the court directs. The points decided as a step in reach that conclusion may be litigated again, and bind only those over whom the court has personal jurisdiction. *Stewart v. Eaton,* 287 Mich. 466, cited by the court, is direct authority for this. "The judgment establishing the status of a person or a thing, or the title to property, is conclusive on everyone, but not so of the related findings of fact, no matter how necessary to the result * * * The effect on the *res* cannot be disputed, but to extend the finality of

the judgment to its inducing conclusions of fact, when the same facts are later at issue in a collateral action not affecting the *res*, would be to make the judgment *in rem* operate *in personam*." *State, ex rel. Gott v. Fidelity & D. Co.*, 317 Mo. 1078, 298 S. W. 83. A judgment cancelling a mortgage or other lien in a proceeding not based upon actual service, where the judgment rests on a finding that the debt secured has been paid, does not establish the fact of such payment in a collateral suit even between the same parties. It merely releases the land from the lien. *Combs v. Combs*, 249 Ky. 155, 60 S. W. (2) 368, 89 A. L. R. 1095; *Fitch v. Huntington*, 125 Wis. 204, 102 N. W. 1066.

What the lower court has done is directly contrary to this principle. It says in effect that by the decree of the Circuit Court of Appeals it was determined that the drain fund belonged absolutely either to the district or the county, and that all prior taxes levied for the drain were void. To do so it had to hold the bonds void. Treating the suit to subject the fund and assessments as an action *in rem*, and the decree disposing of the fund and assessments as binding upon the world, ergo, all determinations prior to and necessary to such decision also become binding upon the world.

We, therefore, submit that no matter from what angle the case is viewed, error has been committed in holding the Circuit Court of Appeals decree a bar to petitioner's suit.

(c) The Michigan Supreme Court should not have summarily dismissed petitioner's suit on the ground of stare decisis.

We are not sure that the Michigan Supreme Court in its reference to *stare decisis* meant to assert this as an independent ground for dismissing the suit or not. Lest the opinion be so interpreted, we will present our reasons

against such conclusion, and the point that it in itself is a violation of petitioner's right to due process. This turn of the case could not be anticipated before the opinion of the Michigan Supreme Court, and the first opportunity to complain was in the motion for rehearing, wherein petitioner pointed out the violation of the Fourteenth Amendment involved in the action taken (198). It must be noted that the Circuit Judge placed his decision solely on the ground of former adjudication (141).

The *stare decisis* argument is not asserted with respect to the court's conclusion that the suit is barred by former adjudication, for it is not claimed that the cases cited, *Clinton v. Spencer,* 250 Mich. 135, *Kinner v. Spencer,* 257 Mich. 142, etc., have anything to do with the subject of former adjudication. The court must mean that if the case were tried on the merits it would follow these decisions and hold that the improvement here involved is not a drain.

Stare decisis is not of itself a ground for dismissing any suit. It is not recognized in the Michigan Court Rule 18, under which the motion to dismiss is made. Attempting to arrive at the court's meaning, we can only suppose that it meant to say that if it considered the proofs it would arrive at the same conclusion as the Court of Appeals did. It says that the allegations in petitioner's bill, and those in the Keefe bill, are substantially the same. It must have known, however, that the Court of Appeals did not render its decision upon the sufficiency of the allegations in the Keefe bill, but upon the evidence which the parties submitted. There is no precedent to the effect that the allegations in this bill are insufficient; hence nothing to which the doctrine of *stare decisis* could apply, other than what the court may surmise will be the proofs in this case if it is tried.

No challenge to the sufficiency of the bill in this case was made by defendants. The trial court recognized the duty to accept it as true for the purpose of this motion, and we fail to see where the bill is in any way defective.

Granting that if defendants had, by demurrer or equivalent motion under Michigan practice, challenged the sufficiency of the bill, and the court had sustained the challenge, there would be no federal question, we say that a summary dismissal, with no attempt by the court or defendants to question the bill as a sufficient pleading, is a denial of due process. When a plaintiff institutes a suit and files his pleading, and no effective plea in bar is urged, either the pleading must be attacked as failing to state a cause of action, and plaintiff be heard on the question of its sufficiency, or the pleading must be answered and a hearing granted on the issues presented. A party is not given his day in court or accorded due process, who at the threshold of his case is in effect told by the court, "I will not hear your case because I anticipate that you cannot prove it to my satisfaction."

We, therefore, submit that the accompanying petition for certiorari ought to be granted.

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(15)

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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 610

INTERNATIONAL TYPOGRAPHICAL UNION,
a Voluntary Association,
Petitioner (Appellant Below),

vs.

COUNTY OF MACOMB, a Municipal Corporation,
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT,
a Public Quasi Corporation,
BOARD OF SUPERVISORS OF MACOMB COUNTY,
GEORGE T. SMITH, Drain Commissioner of Macomb County,
CARL B. BRANDENBURG, Treasurer of Macomb County,
Respondents (Appellees Below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF FACTS

Petitioner in its Summary Statement of Facts, after setting up the allegations in its bill of complaint and the fact that respondents filed a motion to dismiss, states that the principal ground of the motion to dismiss, and the

only ground considered by the trial court, was the ground of *res adjudicata*. The claim of *res adjudicata* was based upon a decision of the Circuit Court of Appeals, Sixth Circuit, in the case of *Keefe, et al., v. Martin and Branches Drain District, et al.*, 119 Fed. 2d. 157 (certiorari denied by the United States Supreme Court October 13, 1941, 314 U. S. 649, 86 L. Ed. 521) and the decision of the Macomb Circuit Court in the case of *Township of Erin v. Engelbrecht*, Macomb County Chancery No. 8505 (Record 66, 67). The said case of *Keefe, et al., v. Martin and Branches Drain District, et al., supra*, was a class action on behalf of all the bondholders of the class, including petitioner, and all bondholders of the class were therefore bound by the proceedings therein the same as if all bondholders had been nominal parties plaintiff in the suit. It was so held by the District Court in the case of *Keefe, et al., v. Martin and Branches Drain District, et al.* (R. 82, 83, 92), and the Circuit Court of Appeals in said case, 119 Fed. 2d. 157, also held that the action was a class action (R. 18, 19), and that all Martin drain bonds are void (R. 31, 32).

Attorneys for plaintiff bondholders in the Federal case who are the same attorneys who now represent petitioner in this case, repeatedly stated in the bill of complaint in the Federal case that the action was a class action on behalf of all the bondholders (R. 40); that the plaintiffs in said Federal case and all the other bondholders had a common interest in the subject matter of the suit (R. 40, 89); that the plaintiffs in the Federal case intended by bringing the suit that the adjudication would be binding upon all the holders of Martin bonds (R. 41, 89). The attorneys who now represent the petitioner in this case made the above statements under oath in the bill of complaint in the Federal case (R. 88, 89). In a brief filed with the United States Supreme Court in the Federal case the same counsel who now represent petitioner in this

case stated that if in any other suit bondholders were to seek to recover on their bonds the plea of *res judicata* would be raised and would be sustained (R. 93, 94).

In addition to the fact that petitioner was a member of the class on whose behalf the case in the Federal Court was prosecuted the petitioner filed a brief in said case in the Circuit Court of Appeals (R. 95, 104) and in the United States Supreme Court (R. 104). Petitioner knew of the pendency of the Federal class action (R. 102, 103, 104) and has been active in litigation involving various Michigan drains (R. 95, 106, 107). The decision in one of said cases (*Baker et al. v. Ruddiman Valley No. 3 Drain District*), in which petitioner herein was the plaintiff, was largely influential in causing the District Court in the Federal case on the Martin bonds to hold in favor of the bondholders (R. 106, 107). In said Baker case the petitioner was represented by the same counsel who now represent it in this case and who represented the bondholders in the Federal case on the Martin bonds.

The Michigan Supreme Court in this case adopted in full the opinion of the lower court, which based its decision solely on the ground of *res adjudicata,* and then went on to say:

> "Even were we to hold that the lower court was in error in its reasons for the dismissal of the bill of complaint, which we do not, we would feel compelled to affirm the decree of dismissal by reason of the rule of *stare decisis.*"

The basis of the Michigan Supreme Court decision in this case was *res adjudicata* rather than *stare decisis.*

Petitioner, for jurisdictional reasons, now seeks to inject into this case a Constitutional question which was not before the Macomb Circuit Court or the Michigan Supreme Court. Petitioner did not raise the Constitutional question which it now seeks to argue until it filed a motion for rehearing before the Michigan Supreme Court.

The said motion for rehearing was denied. The Constitutional question which respondent now seeks to raise was not raised in the "Statement of Questions Involved" nor in the "Errors Relied upon for Reversal" in the brief for plaintiff and appellant filed with the Michigan Supreme Court. The only time plaintiff and appellant in the Michigan Supreme Court mentioned the Constitutional requirement for due process was in connection with its claim that the lower court had in part based its decision on the ground of *stare decisis*. However, an examination of the opinion of the trial court and the Michigan Supreme Court (Record 157-168) readily proves that the case was not decided on the ground of *stare decisis* and any reference to the Constitutional question in this regard is not important here.

In the case of *Keefe, et al., v. Martin and Branches Drain District, et al., supra,* the Circuit Court of Appeals held in addition to other reasons for holding in favor of the defendant Drain District, et al., that the decision in the case of *Township of Erin v. Engelbrecht* is *res adjudicata* as to the issues in the said Keefe case (Record 34-36). Keefe, et al., representing all the Martin Drain District bondholders, petitioned this court for certiorari, alleging that the decision of the Circuit Court of Appeals deprived the bondholders of due process of law, in violation of the Fifth and Fourteenth Amendments. This court denied certiorari on October 13, 1941, and subsequently denied a petition for rehearing. It therefore appears that the identical claim now before this court was before this court in the case of *Keefe, et al., v. Martin and Branches Drain District, supra,* and that this court denied certiorari.

ARGUMENT

We respectfully submit that the reasons relied upon by petitioner for the allowance of the Writ of Certiorari do not entitle it to the writ.

Petitioner has failed to establish the basis of jurisdiction invoked under Section 237(b), Judicial Code, on page 2 of the petition. Petitioner claims that this case comes within Section 237(b) but does not point out where in the lower court "any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution" or otherwise, and an examination of the record will disclose that no such title, right, privilege or immunity was specially set up or claimed by either party until after the decision of the Michigan Supreme Court.

An examination of the "Questions Presented by the Petitioner" and the "Reasons Relied upon for Allowance of the Writ," on pages 7-9 of the Petition for Certiorari, discloses that the questions raised and reasons relied upon for the allowance of the writ can be summarized as follows:

1. Are the cases of *Keefe, et al., v. Martin and Branches Drain District, et al., supra,* and *Township of Erin v. Engelbrecht, supra, res adjudicata* as to the claims of the plaintiff in this case?

2. Did the Macomb Circuit Court and the Michigan Supreme Court decide this case on the ground of *stare decisis* as well as on the ground of *res adjudicata?*

I.

PETITIONER'S ALLEGED CAUSE OF ACTION IS BARRED BY THE APPLICATION OF THE DOCTRINE OF RES ADJUDICATA

We do not agree with petitioner's statements with reference to the nature of class suits nor do we agree with its statement that the class suit theory has outlived its usefulness. We believe that the correct nature of class actions and the necessity therefor will fully appear in the following sections of this brief dealing with numerous class actions and the various court rules governing said actions. At this point it will suffice to say that class actions, the judgments in which are binding upon all members of the class, do perform a very necessary and useful function and that the binding effect of class judgments has been recognized in practically every state of the Union, including Michigan, in two very strong and exhaustive opinions in the cases of *City of Detroit v. Detroit United Railway*, 226 Mich. 354, and *American State Savings Bank, Trustee, v. American State Savings Bank*, 288 Mich. 78. Petitioner's present contention that the Federal class action on the Martin bonds did not result in a judgment binding upon all the members of the class is directly contradicted by strong and explicit statements in pleadings in the Keefe case filed by the same counsel who now represent the petitioner, by the findings of the Special Master in the Federal case, by the opinion and judgment of the District Court, by the opinion and decree of the Circuit Court of Appeals, by the opinions and decrees of the lower courts in this case, by numerous texts written on the subject, and by hundreds of cases decided by this Court and other courts throughout the various states of the Union.

A. The Doctrine of Res Judicata Is Applicable to this Case.

In *30 American Jurisprudence*, 908, the doctrine of *res judicata* is defined and explained as follows:

> "Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. * * *
>
> "Under the rule firmly established in the United States, the doctrine of *res judicata* extends to judgments of all courts. The doctrine prevails whether the judgment involved is rendered by the same court in which the subsequent action is prosecuted, or by a court of independent or concurrent jurisdiction. * * *
>
> "The doctrine of *res judicata* may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquillity. Public money and the interest of litigants alike require that there be an end to litigation which, without the doctrine of *res judicata*, would be endless. The doctrine of *res judicata* rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of *res judicata* not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings. * * *"

It becomes apparent from an examination of the records and files in the case of *Keefe v. Martin and Branches*

Drain District, 119 Fed. 2d. 157, that the parties, the subject matter and the relief sought are identical to those in this case. The parties are the same because the same bondholder which brings this case was represented as a member of the class of bondholders upon whose behalf the Keefe case was prosecuted and because the same bondholder actually participated in the Keefe case. The subject matter is the same because in both cases the validity of the Martin and Branches Drain District proceedings, and the bonds issued as a part of said proceedings to pay for said project, is in question. The relief sought is the same because in both cases the bondholders seek a judgment which would force the levy and collection of taxes to pay for their bonds.

B. The Federal Action for Recovery on the Martin and Branches Drain District Bonds Was a Class Suit.

The position of petitioner's counsel in the present case is to say the least somewhat anomalous. The bill of complaint in the Keefe case involving the Martin project was drafted with the express and clearly stated purpose of making the suit a class action on behalf of all the bondholders under the provisions of the Federal Court rules.

Among the provisions in the bill of complaint (sworn to by counsel who now represent petitioner in this case) in the Federal suit on the Martin bonds proving that the action was a class suit and that it was intended that the judgment therein would bind all the holders of Martin Drain District bonds, are the following:

R. 40, 89:

> "Both plaintiffs and such other bondholders have a common interest in the subject matter of this suit,

and plaintiffs signed this bill in behalf of such other bondholders as well as themselves."

R. 41, 89:

> Plaintiffs, therefore, intend by bringing this suit that the adjudication sought will be binding upon all holders of bonds of said district and all persons, firms or corporations who have paid or may be liable for said assessments levied in connection with the said drain."

R. 46, 90:

> "Said Martin Drain and Branches District bonds have been widely distributed among a large number of holders numbering as plaintiffs are informed and believe several hundred scattered throughout several states in the Union. Said bondholders constitute a class so numerous as to make it impracticable to bring them all before this Court. The questions involved in this suit are of common and general interest to all of such holders."

Among the prayers included in the bill of complaint of said Federal Court suit are the following:

R. 59:

> "That the court decree that all of the Martin Drain and Branches Drain District Bonds issued as above set forth, with the coupons thereto annexed, are valid and binding obligations of the Martin Drain and Branches Drain District according to their tenor, and that all of the special assessments in connection with which they were issued are valid and enforceable."

R. 60:

> "That the defendants Drain Commissioner, Board of Supervisors, County Clerk and County Treasurer be required by mandatory injunction of

this court to proceed from time to time, as required by law, to levy and collect assessments upon the taxable real property located within the boundaries of the district, and against the County of Macomb, Townships of Erin and Lake, and State of Michigan, said assessments to be sufficient in amount to pay all interest and principal now due and to become due upon all of said bonds, and sufficient further to meet the principal of said bonds and coupons appurtenant thereto at maturity, and to deposit in the Martin Drain and Branches Drain District Fund and to preserve intact for the benefit of plaintiffs and all other owners and holders of said bonds, all moneys to be derived from such assessments."

The foregoing statements are taken from the sworn bill of complaint in the Federal case and the *jurat* signed by present counsel for petitioner in this case stated as follows (R. 63):

"State of Michigan,
County of Wayne—ss.

Irvin Long and Elroy O. Jones, being duly sworn, depose and say:

That they are attorneys for the plaintiff named in the foregoing bill of complaint; that they have read the same and know the contents thereof; and that the bill of complaint is true of their own knowledge, except as to matters that are therein alleged on information and belief, and as to such matters they believe them to be true. Further, that they have executed the foregoing bill of complaint upon behalf of plaintiffs with the express authority of plaintiffs, and that they executed same on behalf of plaintiffs for the reason that practically all of the allegations of the bill of complaint are based upon knowledge of deponents acquired through examination of the records of the county officers of the County of Macomb, and for this

reason these deponents are the proper persons to verify said bill.

Irvin Long,
Elroy O. Jones.

Subscribed and sworn to before me this 30th day of December, A. D. 1932.

Betty Taylor,
Notary Public, Wayne County, Michigan.
My commission expires May 17, 1936."

The Keefe case on the Martin bonds was accepted in good faith by all the parties thereto as a class action on behalf of all the bondholders, and the Special Master, the District Court and the *Circuit Court of Appeals* in said case, without equivocation, all held the said suit to be a class suit. In the said Keefe case the District Court entered a decree in favor of all the bondholders, which, among other things, provided that all the bondholders were to be assessed on a *pro rata* basis for their respective share of the expenses and legal fees. In similar cases such as the case of *Keefe v. Royal Oak Drain District*, 87 Fed. 2d. 787, and *Keefe v. Mound Park Drain District*, No. 5736, District Court of the United States for the Eastern District of Michigan, Southern Division, where the projects were held to be legal drains, all of the bondholders were held to be entitled to the benefits of the decree and all the bondholders accepted the benefits of the decree. In like manner in the said Martin case, counsel, now representing petitioner herein, petitioned for and were granted the right to assess all bondholders, regardless of whether or not they had deposited their bonds with the committee, for their *pro rata* share of the expenses and attorneys' fees. There was nothing said at that time by counsel to the effect that said suits were "spurious class suits" and that non-depositing bondholders were not bound by the decree and were not bound to pay their share of the expenses and fees.

In answering petitioner's contentions we believe that it will be helpful to the Court at the outset to set out the various Federal Court rules authorizing class suits.

Rule 48, the original Federal rule on class suits, after providing that in the class suit one or more of a class may sue or defend for the whole class, further provided:

> "The decree shall be without prejudice to the rights and claims of all absent parties."

It is significant that in rule 38, which supplanted rule 48, the last clause quoted above was dropped out and rule 38 provided as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

It is in the provisions of rule 38 that we are particularly interested because the Federal class action on the Martin bonds was brought under the provisions of rule 38. With reference to this rule it is stated in Montgomery's Manual of Federal Jurisdiction and Procedure, Third Edition, page 540:

> "As a matter of convenience, therefore, and to prevent a failure of justice, a court of equity permits less than all of the members of the class to act as representatives of the entire body; *and the decree is deemed to bind the membership in general, as though all the individuals were before the Court.*" (Emphasis supplied.)

When the new Federal Rules of Civil Procedure were adopted rule 23 supplanted rule 38. Rule 23 provides as follows:

> "Representation. If persons constituting a class are so numerous as to make it impracticable to

> bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The above rule 23 is a substantial restatement of Equity Rule 38 (representatives of class) as that rule has been construed (see note of committee which drafted the rule, 2 Moore's Federal Practice, 2220). The said committee further stated:

> "The general test of Equity Rule 38 (representatives of class) that the question should be 'one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court' is a common test."

Petitioner is represented in this case by the same counsel who appeared for bondholders in the *Keefe v. Martin Drain District* case. It cannot be said that such representation is a determining factor in this case, but it is material to note that the claim of the bondholders by their counsel in the Federal litigation was the same as the respondents here now urge in support of the motion to dismiss the complaint. The substance of the previous position of the bondholders is not only reflected in the afore-

said District Court judgment in the Martin case, which was drafted by counsel for the bondholders for the District Judge's signature, but it is also clearly reflected in their brief filed in the United States Supreme Court in support of the petition for certiorari in the *Keefe v. Martin Drain District* case, where it is stated:

> "If this court permits the lower court decision to stand, bondholders will be barred from any other suit to recover these sums, for it is now adjudicated that they have no right at all to any of the relief prayed or granted by the District Court. A reversal of the judgment granting relief, and dismissal of the bill of complaint is a final determination that the District Court's judgment in every respect was wrong. We, therefore, trust that this court will not be misled by any assurance of respondents that this point need not be considered because in some other case bondholders can secure this relief. *If any other case were started they would promptly plead res judicata, and the plea would be sustained.*" (Emphasis supplied.)

C. The Decree in the Federal Suit on the Martin Bonds Is Res Judicata as to the Rights of Petitioner in this Case.

Petitioner concedes that the judgment of the Federal Court in the Keefe case dismissing the bill of complaint determined that the plaintiff bondholders in the Keefe case and the intervening bondholders do not hold valid bonds and that the binding effect of the Federal judgment is such that these parties cannot again sue on their cause of action. The substance of petitioner's claim in the lower court was that even though bondholders who were parties to the Federal litigation are bound by the judgment, that the plaintiff in this case, who was not a nominal party to the Federal suit, can sustain the present action because the Federal

judgment was a judgment *in personam* and cannot bind parties not actually before the Court by service of process or voluntary appearance.

It has always been the rule that in an action *in rem* a judgment can be entered affecting the rights of a person to the *res*, which is the subject matter of the action, without personal service of process on the party who owns the *res*. On the other hand it is the general rule that a binding judgment *in personam* cannot be rendered against a person who has not been made a party to litigation by service of process, *Pennoyer v. Neff*, 95 U. S. 714. However, there is a well-recognized exception to the rule stated in *Pennoyer v. Neff* and it is this exception that petitioner has failed to recognize throughout its brief in this case. The generally accepted rule of law which permits class actions constitutes the exception to the general rule. In referring to this exception to the general rule stated in *Pennoyer v. Neff* the cases and texts are obviously referring to a judgment *in personam* rather than to a judgment *in rem* because:

(1) The case of *Pennoyer v. Neff* dealt only with the question of the binding effect of a judgment *in personam* where service of process has not been made; and

(2) Obviously the fact that there can be a binding judgment in the absence of personal service in an action *in rem* is not an exception to the general rule because the right to such a judgment has always been accepted. The fact that the class suit doctrine does constitute an exception to the general rule that a judgment *in personam* will not be binding against one not made a party by service of process is clearly recognized by the United States Supreme Court and by the Michigan Supreme Court. In the case of *Hansberry v. Lee*, 311 U. S. 32—61 Supreme Court—115, it was held:

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U. S. 714; *1 Freeman on Judgments* (5th Ed.) at 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, *R. S. ¶ 905, 28 U. S. C. ¶ 687*, prescribe, *Pennoyer v. Neff, supra; Lafayette Ins. Co. v. French*, 18 How. 404; *Hall v. Lanning*, 91 U. S. 160; *Baker v. Baker, E. & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464; *Old Wayne Mut. L. Assn. v. McDonough*, 204 U. S. 8.

"* * * *To these general rules there is a recognized exception* that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. *Smith v. Swormstedt*, 16 How. 288; *Royal Arcanum v. Green*, 237 U. S. 531; *Hartford L. Ins. Co. v. Ibs*, 237 U. S. 662; *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; *cf. Christopher v. Brusselback*, 302 U. S. 500 * * *

"* * * In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the former fairly represent the latter in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree. *Brown v. Vermuden*, Ch. Cas. 272; *City of London v. Richmond*, 2 Vern 421; *Cockburn v. Thompson*, 16 Ves. Jr. 321; *West v. Randall*, 2

Mas. 181; *Beatty v. Kurtz*, 2 Pet. 566; *Smith v. Swormstedt, supra; Supreme Tribe of Ben Hur v. Cauble, supra; Story, Equity Pleadings* (2d Ed.) at 98. * * *

"* * * *It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, Plum v. Goodnow*, 123 U. S. 560; *Confectioners' Machinery Co. v. Racine Engine & Mach. Co.*, 163 Fed. 914; 170 Fed. 1021; *Bryant E. Co. v. Marshall*, 169 Fed. 426, *or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. Smith v. Swormstedt, supra; cf. Christopher v. Brusselback, supra*, 503, 504, *and cases cited.*

"In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in the judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit. See *Bernheimer v. Converse*, 206 U. S. 516; *Marin v. Angedahl*, 247 U. S. 142; *Chandler v. Peketz*, 297 U. S. 609 * * *" (Emphasis supplied.)

In the case of *Detroit v. Detroit United Railway*, 226 Mich. 354, the Court stated:

"While the general rule undoubtedly requires that all *persons* interested must be made parties to any proceeding by which *they may be affected*, yet

to this rule there are well recognized exceptions, founded upon considerations of practical convenience, and adopted to avoid a denial of justice.

"These exceptions are thus stated in *Story's Equity Pleadings* (10th Ed.) at 97:

> "'(1) Where the question is one of a common or general interest and one or more sue or defend for the benefit of the whole. (2) Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole. (3) Where the parties are very numerous and though they have or may have had separate and distinct interests, yet it is impracticable to bring them all before the court.'

"In discussing the exceptions, the learned author says (pp. 96, 120):

> "'It has been well observed that the general rule, being established for the convenient administration of justice, ought not to be adhered to in cases in which, consistently with practical convenience, it is incapable of application; for then it would destroy the very purpose for which it was established. The exceptions, therefore, turn upon the same principle, upon which the rule is founded. They are resolvable into this, either that the court must wholly deny the plaintiff the equitable relief, to which he is entitled, or that the relief must be granted without making other persons parties.
>
> "'It is obvious that under such circumstances, the *interests of persons*, not actual parties to the suit, may be in some manner affected by the decree; but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice. Indeed, in most, if not in all, cases of this sort, the decree obtained upon such

a bill will ordinarily be *held binding upon all other persons* standing in the same predicament the court taking care that sufficient persons are before it, honestly, fairly, and fully, to ascertain and try the general right in contest. * * *'

"* * * It needs to be better understood that judgments only bind the parties and their privies, and that when it is sought to *bind persons* not made parties individually, that fact and the necessity, should be made plain to hand, that the court may determine whether sufficient parties are before it, and may take proper care of the rights of the absent. * * *.

" 'Another class of cases constituting an exception to the general rule as to parties is where the parties are very numerous and, although they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court, and on this account they are dispensed with. In this class of cases there is usually a privity of interest between the parties, but such privity is not the foundation of the exception. In all of these cases, however, there always exists a common interest or common right which the bill seeks to establish and enforce, or a general claim of privilege which it seeks to establish or to narrow, or take away. Under such circumstances, the interests of persons not actual parties to the suit, may be in some measure affected by the decree, but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice. In most, if not in all, cases of this sort, the decree obtained upon such a bill will ordinarily be held *binding upon all other persons* standing in the same predicament, the court taking care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest. * * * In this class of cases all the parties stand, or are supposed to stand, in the same situation, and

> have one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any. Therefore, the bill is permitted to be filed by a few on behalf of themselves and all others, or against a few, and yet to bind the *rights and interests* of the others!' * * *'" (Emphasis supplied.)

The foregoing case was cited with approval in the case of *American State Savings Bank, Trustee, v. American State Savings Bank,* 288 Mich. 78, and in said case the opinion of the Court in the *Detroit United Railway case* was quoted at length. In the *American State Bank case* the Court held:

> "There was no issue that could be raised by petitioner in such circumstances that would not affect all other depositors or holders of certificates in the same way. One certificate holder could not have greater rights as to his claim than another, and what would have been a defense or answer to the bill for one would have been the same for another. Their rights and defenses were identical. Petitioner was a member of the class represented by the named defendants. In *City of Detroit v. Railway,* 226 Mich. 354, the class suit doctrine was adopted by this court.
>
> "* * * It must necessarily be seen from the foregoing that there are in fact enough of the *bondholders of a class, before the court to give it jurisdiction over the absentees, and in making a decree, to completely and effectually bind their interests.*" (Emphasis supplied.)

On page 19 of its brief, petitioner quotes from the case of *American State Savings Bank v. American State Savings Bank, Trustee,* 288 Mich. 78, and attempts to convey the impression to this court that the Michigan courts apparently condemn the theory of class representation.

Petitioner states that the Michigan Supreme Court held in the American State Bank case that in a representative suit "there can be little danger that the interests of all will be properly protected and maintained," and argues from this statement, as quoted by petitioner, that the Michigan court is not concerned with the fact that injustice may result from the application of the doctrine of class representation, and petitioner further argues that the class suit theory has outlived its usefulness. Petitioner has not correctly quoted the statement of the Michigan Supreme Court in the American State Bank case and the argument based upon the incorrect quotation is just as incorrect as petitioner's quotation. Correctly quoted, the Michigan Supreme Court stated:

> "The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The repeated statements by the United States Supreme Court and the Michigan Supreme Court to the effect that the class suit doctrine permits a decree binding upon "*persons* not made parties individually" leave no doubt that in a class suit a decree can be properly entered in an action *in personam* which is binding upon persons who are not parties to the action but who were properly represented by other members of the class.

As a matter of fact, when the reason and purpose behind the rule which permits a class action is considered in connection with the facts in the Federal case on the Martin bonds, it becomes perfectly obvious that the facts in the Martin case fit exactly into the intent and purpose of the rule. It was the purpose of the rule to provide a

remedy where there was a question of common or general interest to members of a class too numerous to conveniently make them all parties to the action. The class action made it possible to obtain a decision as to the question of common or general interest binding upon all members of the class where it would otherwise have been impossible to obtain a judgment. It was, of course, required that the members of the class be adequately represented by a member or members of the class, who would properly represent the interest of all the members of the class. Certainly all the Martin bondholders were well represented in the Federal case on the Martin bonds. There was nothing which the absent members could have done which was left undone by the bondholders' committee in the litigation which lasted for a period in excess of ten years, and which was carried all the way to a final decision in the United States Supreme Court. By means of the representation given them all the members of the class had their day in court and the decision is binding upon all of them. If this were not true the class suit doctrine might as well not be in existence because it would be of no practical use whatsoever.

Petitioner is in substance arguing that despite the admitted fact that a major proportion of the Martin bonds have been declared void and the assessments cancelled, a judgment should be entered holding some bonds of the same series, of like date and tenor, to be valid bonds and providing for assessments to pay for said bonds. The statute which provided for the issuance of the bonds and the levy of assessments to pay the principal and interest of the bonds applied equally to all the Martin bonds. The actions of the drain commissioner, including the issuance of the Martin bonds, have been held to be illegal and void for want of jurisdiction. It is absolutely illogical to say that the drain commissioner was without jurisdiction so

far as some bonds were concerned, but that with reference to other bonds he had jurisdiction.

No court would have a right to find that some of the Martin bonds are void and that assessments levied to pay them should be cancelled and then find that others of the same series of bonds are valid and that assessments to pay them must be levied. Since it appears that a judgment affecting a major proportion of the Martin bonds must necessarily affect all of the Martin bonds, it follows that the interests of all of the bondholders are united and that, in fact, their rights are common rights. This is not a new theory so far as the Martin bondholders are concerned, but is one which was clearly recognized by the Martin bondholders in their suit in the Federal Court and by the attorneys who in that case represented all the Martin bondholders and who now represent plaintiff, because in paragraph three of the sworn bill of complaint (R. 40-41) in said case it was stated:

> "The number of holders of such bonds is very large and their names and whereabouts in many cases are unknown to plaintiffs, and for that reason it is impossible to make all of said bondholders parties hereto. *Both plaintiffs and such other bondholders have a common interest in the subject matter of this suit, and plaintiffs file this bill in behalf of such other bondholders, as well as themselves.*" * * * (Emphasis supplied.)

> "Plaintiffs, therefore, intend by bringing this suit that the adjudication sought will be binding upon all holders of bonds of said district, and all persons, firms and corporations who have paid or may be liable for special assessments levied in connection with the said drain."

The opinion of the Circuit Court of Appeals in the Keefe case held that the action was a class action and that all the bonds are void. There can be no explanation

for this decision other than that the Federal Court had determined that the action was a proper class action in which the Court had the jurisdiction to enter a decree binding upon all the members of the class. Petitioner in its brief has sought to create the impression that the District Court in the *Keefe v. Martin* case made no holding which could be construed to mean that its judgment was binding upon all the bondholders whether they were parties or not. However, the District Court did make a holding in its judgment which we think is one of the utmost importance because in so doing the District Court decided exactly the same question with reference to the same facts that are now before this court. We think this Court need go no further for a precedent controlling as to the law in this case than the following provision of the judgment of the said District Court:

R. 82-83:

> "9. The questions involved in this suit are of common or general interest to all persons who may now or hereafter own or hold said Martin Drain and Branches Drain District Bonds or the coupons appurtenant and appertaininng thereto, and such persons are constantly changing and constitute a class so numerous as to make it impracticable to bring them all before the Court, and plaintiffs have properly sued upon behalf of themselves and the whole of said class under Rule 23 of the Rules of Civil Procedure for the District Courts of the United States, *and this judgment shall be binding upon all of such persons to the same extent and with the same effect as though each of such persons had been a party plaintiff in this suit*" (Emphasis supplied).

The same question was before the Circuit Court of Appeals in the case of *Royal Oak v. Keefe, supra,* and the Court held:

> "We deal first with the status of the plaintiffs in respect to their right to sue in the federal court on behalf of the class for whose benefit the action was brought. They are all residents and citizens of states other than Michigan. The defendants are municipal corporations, legislative entities, or individual citizens of Michigan, and no question is raised as to the amount in controversy. *Equity Rule 38*, 28 U. S. C. A. following section 723 provides that: 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole' * * *.
>
> "The decree herein operates against the County of Oakland, and county officers, who are ordered and directed to cause special assessments and installments of drain taxes to be levied and collected in the manner provided by law for the purpose of *paying the plaintiffs and other holders of bonds and coupons which were due at the date hereof*" (Emphasis supplied).

Again the same question was before the special master in the case of *Keefe v. Mound Park Branches Drain District*, No. 5736, District Court of the United States for the Eastern District of Michigan, Southern Division, and he held in referring to the above Royal Oak opinion:

> "The character of the action as a class suit binding bondholders who did not deposit their bonds with the plaintiff, as well as the suability of the drain district, have been settled by the Royal Oak opinion."

D. Cases Cited by Petitioner Are Not Applicable to Facts in this Case.

Petitioner refers to a number of cases brought under the provisions of the Federal Minimum Wage Act which are on their face obviously distinguishable from the facts

in the Federal case on the Martin bonds. An examination of the other cases cited by petitioner readily shows that said cases do not support petitioner's present contention and in many cases relied upon by petitioner to sustain jurisdiction in this court, such as the case of *Hansberry v. Lee, supra,* the decisions definitely support the position of respondents. Most of the cases cited by petitioner in its brief were cited in briefs filed in the lower courts and respondents pointed out in their briefs filed in the lower courts the fact that said cases were not in point in this case or did not hold what petitioner claims for them. Petitioner now claims, on page 19 of its brief, that this court has made an unwarranted and erroneous assumption in its decisions in the cases of: *Smith v. Swormstedt,* 16 How. 288; *Hartford Life Ins. Co. v. Ibs,* 237 U. S. 662; *Supreme Tribe of Ben Hur v. Cauble,* 255 U. S. 356; and *Hansberry v. Lee,* 311 U. S. 32. It is apparent that petitioner feels that any court, whether it be the Michigan Supreme Court or this court, which makes a decision not in conformity with petitioner's theory has made an erroneous assumption and has handed down bad law. We respectfully submit that the cases cited above are correctly decided; that the Michigan Supreme Court was correct in following the above decisions of this court in applying the class suit doctrine, and that the decision of the Michigan Supreme Court in this case is correct and should not be disturbed.

E. The Case of Keefe, et al., v. Martin and Branches Drain District, et al., Supra, Was a Proceeding In Rem.

In the Macomb Circuit Court and the Michigan Supreme Court petitioner argued strenuously that the Keefe case on the Martin bonds in the Federal Court was a proceeding *in personam* and claimed that there cannot be a class

action binding upon all the members of the class in a proceeding *in personam* in the absence of service upon all the members of the class. Petitioner conceded in the lower courts that if the action in the Keefe case had been a proceeding *in rem* that the decision in said case would be binding upon all the Martin bondholders whether they were parties to the action or not. Petitioner has now switched its theory and apparently claims that regardless of whether the class action is a proceeding *in rem* or *in personam* there can be no binding judgment against a party who is not actually before the court. We have previously pointed out that class actions do perform a very necessary and useful function in our jurisprudence and that without class actions in many cases it would be impossible to bring a case to a legal determination. In the preceding sections of this brief we have proved that the decision in the case of *Keefe, et al., v. Martin and Branches Drain District, et al.,* was binding upon all the Martin bondholders whether they were actually present in court or not and that the class action constitutes the exception to the general rule that personal service must be had to bind interested parties in an action *in personam.* Petitioner contended in the Michigan Supreme Court in this case that the Keefe case was an action *in personam.* Petitioner conceded that if the Keefe case had been *in rem* that petitioner would have been bound by the decision in the Keefe case. Respondents filed a brief contending that the Keefe case was a proceeding *in rem* and the Michigan Supreme Court held in its opinion in this case that the Keefe case was a proceeding *in rem* and binding upon all the Martin bondholders (Record 166-168). This decision of the Michigan Supreme Court, in accordance with the principle announced by this court in the case of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, is binding upon the Federal Courts. The question of whether the

Keefe case was a proceeding *in personam* or *in rem* was thoroughly briefed by respondents in the Michigan Supreme Court has been decided by the Michigan Supreme Court and because of the Erie Railroad case decision it seems unnecessary to review those decisions here.

F. The Present Suit Is Barred by a Prior Judgment of the Macomb Circuit Court in the Case of Township of Erin v. County of Macomb, Macomb County Board of Supervisors, Macomb County Drain Commissioner and Macomb County Treasurer, Chancery No. 8505.

In the above case the unappealed from decree of the Circuit Court provided as follows:

"DECREE

"At a session of said court held in the City of Mt. Clemens, Macomb County, Michigan, on the 16th day of September, A. D. 1932.

Present: Honorable James E. Spier, Circuit Judge

This cause having come on to be heard on its merits, and upon the pleadings filed in this cause, and upon the proofs taken in open court, it is ordered, adjudged and decreed:

That all proceedings and actions heretofore taken by the defendants as set forth in the bill of complaint filed in this cause, relative to the survey, location, etsablishment and construction of the Martin Drain, the extension of the outlet thereof, and all apportionments and assessments made thereon, against the plaintiffs and the lands of said plaintiff, are decreed to be illegal, unlawful, null and void, and of no effect whatsoever, and said apportionments and assessments be and are hereby cancelled, vacated and set aside, and the said lands

of plaintiffs be and are hereby forever discharged of and from the apparent lien thereof:

That the defendant, Thomas F. Simms, Treasurer of Macomb County, Michigan, and his successors in office, be and are hereby perpetually enjoined and restrained from collecting or attempting to collect any of the assessments levied against the said respective plaintiffs, or the respective parcels of land taxed or assessed against them in the tax roll for the location, establishment and construction of said Martin Drain and from attempting to collect of said plaintiff for the non-payment of said assessments.

James E. Spier,
Circuit Judge."

Under the theory of the decision of the United States Supreme Court in the case of *Kersh Lake Drainage District, et al., v. Johnson,* 84 Law Ed. 634, which decision was held by the Circuit Court of Appeals in the case of *Keefe, et al., v. Martin and Branches Drain District, supra,* to be applicable to the rights of the bondholders of the Martin Drain District, the above decree is *res judicata* of the rights of the bondholders because the bondholders of said drain district were represented by the drain commissioner.

The lower court in this case held with defendants on this issue when it held:

"It is not necessary for a final decision of this caes to hold that the Township of Erin case is *res judicata* of the rights of all bondholders because this court finds and determines that the Circuit Court of Appeals settled this question in the Federal Martin bond suit when it held:

'The officers of the drain district represented all the creditors of the district, including the bondholders, in the state court cases, and thus

> appellants had notice and were given their day in court in those cases. In the cases where these projects have been found invalid by the Supreme Court of Michigan or lower state courts whose judgments have become final, the drain commissioners were parties and the holdings were uniformly to the effect that such illegality made the entire proceedings void, deprived the drain commissioner of jurisdiction in the premises, and required cancellation of the assessments. Appellees were not made parties to the suits in the state court, and the validity of the bonds was not there in issue, and upon this ground the District Court held that the Michigan decisions did not bind the appellees in the instant cases. However, under the decision of the United States Supreme Court in *Kersh Lake Drainage Dist. v. Johnson*, 309 U. S. 485, announced subsequent to the decision of the District Court herein, those cases are *res judicata* as to the determinative facts of this controversy.' "

The Michigan Supreme Court in the case of *City of Highland Park v. Clark*, 300 Mich. 501, clearly stated the rule of law applicable to these illegal projects and wound up its opinion by citing with approval the decision of the Federal Court on the Martin bonds, which petitioner now says is not correctly decided. The Michigan Supreme Court in the said Highland Park case stated:

> "Careful consideration requires the conclusion that the decision in the instant case is governed by the reasoning in *Village of Oak Park v. Van Wagoner, supra.* Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void

and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, 'The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law.' We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof * * *."

"If the levy of a tax in 1935 'would constitute the taking of property without due process of law,' the levying of a tax now would also constitute the taking of property without due process of law * * *."

"Since we held in 1935 that it was illegal to levy and collect any tax assessed as a result of this project, under the doctrine of *stare decisis* we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project * * *."

"The Federal Courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. *Bloomfield Village Drain District v. Keefe,* and four other cases (C. C. A. (6th Circuit), March 14, 1941), 119 Fed. 2nd 157."

Thus in the foregoing language the Michigan Supreme Court gave its approval to the Federal Court decision holding the bonds of all Martin bondholders void, and has again in this case given its approval to the Federal Court decision in the Keefe case by holding that decision to be *res judicata* in this case. This court refused to grant certiorari in the Keefe case and we respectfully submit that this court should refuse to grant certiorari in this case where the Michigan Supreme Court has followed the decision in the Keefe case.

II.

THE MACOMB CIRCUIT COURT AND THE MICHIGAN SUPREME COURT DECIDED THIS CASE SOLELY ON THE GROUNDS OF RES ADJUDICATA

Petitioner's claim that the decision of the Michigan Supreme Court in this case is based both upon the applicability of the doctrine of *res judicata* and *stare decisis* is incorrect. The Michigan Supreme Court adopted in full the opinion of the lower court which based its decision solely on the grounds of *res judicata*. On page 2 of the opinion of the lower court (R. 142) the lower court stated: "Defendants' motion cites six grounds as reasons for dismissal of the bill of complaint but the court finds it necessary to consider only one of the grounds which come within the provisions of Court Rule No. 18, namely, that the cause of action is barred by a prior judgment." The opinion of the lower court holding that defendants' motion to dismiss should be granted was based entirely on the ground that prior decisions involving the same parties and same subject matter involved in this case are *res judicata* as to the issues in this case. The Macomb Circuit Court made no mention of the doctrine of *stare decisis*. The Michigan Supreme Court, after quoting in full the opinion of the lower court, went on to say:

> "Even if we were to hold that the lower court was in error in its reasons for the dismissal of the bill of complaint, *which we do not*, we would feel compelled to affirm the decree of dismissal by reason of the rule of *stare decisis*." (Emphasis supplied.)

It is obvious, therefore, that the basis of the Michigan Supreme Court decision in this case was *res judicata* rather than *stare decisis*.

III.

CONCLUSION

The bonds upon which petitioner is suing are void bonds. They have been held to be illegal and void because of a complete lack of jurisdiction in the Drain Commissioner in the cases of *Township of Erin v. Engelbrecht, supra,* decided by the Macomb Circuit Court, and *Keefe, et al., v. Martin and Branches Drain District, et al.,* decided by the Circuit Court of Appeals. The Township of Erin case was held to be *res adjudicata* as to the rights of all Martin bondholders by the Circuit Court of Appeals in the Keefe case (Record 34-36). The Macomb Circuit Court and the Michigan Supreme Court, in deciding this case, have held that the decision in the Keefe case is *res adjudicata* as to the petitioner herein (Record 157-168). The Keefe case was a class action, and, unless this court is prepared to scrap the doctrine of class representation which this court has so often approved, there can be no merit to petitioner's contention that petitioner is not bound by the decision in the Keefe case. The Keefe case was a class action, the decision in which was binding upon all the Martin bondholders, and because it was a class action in which all the members of the class of Martin bondholders were properly represented the Michigan Supreme Court was correct in its decision that the petitioner had its day in court. Petitioner concedes that the Martin bondholders were well represented in the Keefe case and that the bondholders' case was fully and fairly presented. Under the class action doctrine applicable in the Keefe case and under the decision of *Kersh Lake Drainage District, et al., v. Johnson, supra,* applicable to the Township of Erin case, petitioner has had its day in court and has not in any way been deprived of its constitutional right to due process of law.

In conclusion we again wish to point out to this court that petitioner's present contention that it has been deprived of its constitutional right to due process is but an afterthought, and one which was not raised until after the decision of the Michigan Supreme Court. Petitioner did claim in a brief filed in the Michigan Supreme Court that it was deprived of its right to due process of law because the Macomb Circuit Court had decided the case on the ground of *stare decisis* as well as *res adjudicata*. The fact of of the matter is, however, that the decisions of the Macomb Circuit Court and the Michigan Supreme Court were based entirely upon the application of the doctrine of *res adjudicata*. We have pointed out that, in addition to the fact that petitioner was represented as a member of the class in the suit on the Martin bonds, the petitioner knew of the drain litigation involving the Martin bonds; that petitioner was active in drain litigation in Michigan which seriously affected the decision of the Federal District Court in the Keefe case; that petitioner filed briefs in the Circuit Court and in this court in support of the claims of the bondholders in the Keefe case and that attorneys for all the Martin bondholders in the Keefe case who now represent petitioners herein stated in a brief filed in this court in the Keefe case that if the Martin bondholders were to start any other case on the Martin bonds, respondents would promptly plead *res adjudicata* and the plea would be sustained (Record 93-94). In this regard we agree with counsel for petitioner and respectfully submit that for the reasons stated this court should deny the petition for certiorari.

Respectfully submitted,

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